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No. 90-1488

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SUE SUTER, *et al.*,

Petitioners,

v.

ARTIST M., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF

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Petitioners, Sue Suter and Gary T. Morgan, respectfully move this Court, pursuant to Supreme Court Rule 25.5, for leave to file a Supplemental Brief for Petitioners in response to Respondents' Supplemental Brief After Oral Argument. In support of their motion, petitioners state as follows:

1. On January 22, 1992, respondents filed a motion for leave to file Respondents' Supplemental Brief After Oral Argument. Respondents' Supplemental Brief asserts that the Consent Decree entered in *B.H. v. Suter*, No. 88 C 5599 (N.D. Ill. Dec. 20, 1991) (Grady, J.), supports their contention that Section 671(a)(15) of the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 671(a)(15), creates individually enforceable federal rights. Respondents also suggest the Consent Decree may have rendered this case moot.

2. Despite respondents' claims, it is clear on the face of the *B.H.* Decree that it neither supports respondents' position in this case nor renders the case moot. While petitioners believe the *B.H.* Consent Decree is utterly irrelevant to the issues in this appeal, respondents' Supplemental Brief raises a number of misleading assertions that require a brief response.

WHEREFORE, petitioners respectfully request that this Court grant petitioners leave to file the Supplemental Brief for Petitioners.

Dated: February 3, 1992

Respectfully submitted,

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SUPPLEMENTAL BRIEF FOR PETITIONERS

This Supplemental Brief for Petitioners is respectfully submitted in response to Respondents' Supplemental Brief After Oral Argument ("Supplemental Brief") regarding the Consent Decree entered in *B.H. v. Suter*, No. 88 C 5599 (N.D. Ill. Dec. 20, 1991) (Grady, J.).[1] Plaintiffs' Supplemental Brief initially urges this Court to embrace the Decree as legal authority for a ruling in plaintiffs' favor on the merits of this case. (Supp. Br. 4-6). This contention obviously overlooks the fact that a consent decree is not a judicial ruling on the legal issues in *B.H.* and has no effect on issues that may be raised in a separate cause of action such as this one. Moreover, plaintiffs completely misread the provisions of the *B.H.* Decree, which do not include any requirements regarding the timely assignment of caseworkers.

Plaintiffs also include in the Supplemental Brief a tepid suggestion that the *B.H.* Decree "may" affect this Court's jurisdiction in that the Decree "may" render all or part of this case moot. (Supp. Br. 7-10). Plaintiffs therefore ask this Court in the alternative to remand the case for consideration as to whether it is moot. Notably, plaintiffs do not request that the preliminary injunction be vacated and this case dismissed, as would be required if the case were truly moot. *See, e.g., United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).[2] Plaintiffs make no such request because it is clear from the plain language of the *B.H.*

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[1]Plaintiffs indicate in their Supplemental Brief that they have requested that the Clerk of the Court distribute copies of the Decree to the members of the Court. (Supp. Br. n.1).

[2]Plaintiffs' enthusiasm for the *B.H.* Decree in this Court is ironic, as plaintiffs' counsel has filed an appeal in the United States Court of Appeals for the Seventh Circuit challenging the entry of that Decree. Mot. for Leave to File Supp. Br. After Oral Arg. n.1. Thus, plaintiffs are asking this Court to consider this case moot based on a decree that plaintiffs' counsel currently is seeking to vacate. This gambit, if successful, would deny defendants review of a standing injunction in this case *and* deny defendants the benefit of the settlement negotiated in *B.H.* Consequently, defendants respectfully ask this Court, if it decides to remand this case for mootness, to follow the *Munsingwear* rule, and also vacate the rulings of the court of appeals and district court and direct that the case be dismissed.

Decree that in the absence of the preliminary injunction here, DCFS is under no obligation to assign caseworkers within three days after the first court hearing or after the previously assigned caseworker leaves DCFS or is absent. *See* March 2, 1990 Preliminary Inj. (App. 56a). Contrary to plaintiffs' suggestion, their claim that Section 671(a)(15) of the federal Adoption Assistance and Child Welfare Act of 1980 (the "AAA"), 42 U.S.C. § 671(a)(15), may be enforced under 42 U.S.C. § 1983 and requires in this case the prompt assignment of caseworkers remains a very live controversy. (*See* Resp. Br. i).

Thus, plaintiffs' entire Supplemental Brief is completely unfounded, and has resulted in unnecessary delay and a needless increase in the cost of this litigation. A remand is wholly unwarranted and would serve only to exacerbate this waste of time and limited judicial and public resources.[4] This Court is capable of determining from the face of the *B.H.* Decree its effect—or, more accurately, lack of effect—on the case before the Court. Defendants respectfully urge this Court to consider this case on the merits and reverse the decision of the court of appeals.

ARGUMENT

I. PLAINTIFFS MISREAD THE *B.H.* CONSENT DECREE, WHICH NOWHERE REQUIRES THE PROMPT AND CONTINUOUS ASSIGNMENT OF CASEWORKERS

The *B.H.* Decree sets forth a settlement agreed to by DCFS in a separate federal class action challenging a series of alleged statewide deficiencies in the Illinois foster care system.[5] None of the claims raised in *B.H.* involved the prompt and continuous assignment of caseworkers, the gravamen of plaintiffs' claims here. *Compare B.H. v. Johnson*, 715 F. Supp. 1387, 1387-92 (N.D. Ill. 1989) (describing claims and allegations) *and B.H.* Decree at 2

[4]The costs of litigation on both sides in this case are funded by public monies.

[5]Counsel for petitioners here also represents the defendant in *B.H. v. Suter* and was responsible for negotiating the *B.H.* Decree on behalf of the defendant.

(same) with Artist M. Compl. ¶¶ 5-9, 72 (J.A. 6-7, 25). Not surprisingly then, the *B.H.* Decree contains no provisions whatsoever requiring that caseworkers be assigned within three days, as mandated by the preliminary injunction issued below.

This silence was intentional since, as plaintiffs' counsel is well aware, the parties in *B.H.* took great care in the Decree to avoid settling issues that were the subject of other class actions already pending against DCFS, such as *Artist M.*[6] As set forth in detail below, plaintiffs' strained assertions to the contrary are based on a complete misreading of the terms of the Decree.

The "Reasonable Efforts" Provision

Plaintiffs initially cite Paragraph 8 of the Decree, in which DCFS has agreed to make "reasonable efforts to prevent or eliminate the need for removal of the child." Decree ¶ 8. Plaintiffs attempt to equate this provision with the "reasonable efforts" clause contained in Section 671(a)(15).

However, unlike Section 671(a)(15)—which contains no definition of the term "reasonable efforts"—Paragraph 8 of the Decree sets out at length what the *B.H.* parties mean by "reasonable efforts." In particular, unlike the AAA, Paragraph 8 references a specific set of "family preservation services" which are to be provided as "reasonable efforts." These services are set forth in the state law provision incorporated in Paragraph 8.[7] It is this list of

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[6]Likewise, the parties in *B.H.* agreed that the outcome of this case would have no effect on the settlement reached in the *B.H.* Decree. *See* Decree at 4.

[7]The provision cited in Paragraph 8, Ill. Rev. Stat. ch. 23, ¶ 2058.2, states in relevant part:

For purposes of this Act, the term "family preservation services" refers to all services to prevent the placement of children in substitute care, to reunite them with their families if so placed and if reunification is an appropriate goal, or to maintain an adoptive placement. The term "homemaker" includes emergency caretakers, homemakers, caretakers, housekeepers and chore services. The term "counseling" includes individual therapy, infant stimulation therapy, family therapy, group thera-

(footnote continued on following page)

services that will permit the *B.H.* court to systemically evaluate DCFS's compliance with Paragraph 8 by examining whether such services are being provided.[8] There is no comparable definition of "reasonable efforts" set forth in the AAA.

More importantly, Paragraph 8 is utterly devoid of any requirement as to the time within which these "reasonable efforts" services are to be provided. Plaintiffs' case here is founded on their assertion that Section 671(a)(15) requires that "reasonable efforts" be made within a specific time period, namely three days after the commencement of a court case. March 2, 1990 Preliminary Inj. (App. 51a); *see also* Compl. Prayer for Relief ¶ 2 (J.A. 26) (seeking caseworker assignment within twenty-four hours). This claim clearly is not addressed in any way by Paragraph 8.[9]

The "Initial Assessment" Provision

Plaintiffs next turn to Paragraph 7 of the Decree regarding "Initial Assessments," where DCFS has agreed that by July 1993, the Department will perform "initial social assessments" prior to

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(footnote continued from previous page)
py, self-help groups, drug and alcohol abuse counseling, vocational counseling and post-adoptive services. The term "day care" includes protective day care and day care to meet educational, prevocational or vocational needs. The term "emergency assistance and advocacy" includes coordinated services to secure emergency cash, food, housing and medical assistance or advocacy for other subsistence and family protective needs.

[8]Contrary to plaintiffs' suggestion (Supp. Br. 6), the reference in Paragraph 8 to "good social work practice" does not mean that the various standards promoted by plaintiffs' *amici* now are incorporated wholesale in the *B.H.* Decree. Indeed, in this case, it is the professional judgment of DCFS child welfare administrators that a rigid across-the-board time limit is *not* good social work practice. (1/17/89 Tr. 257-62; R. 84 at 4-8).

[9]Plaintiffs also cite Paragraph 16a of the Decree, which requires "reasonable efforts to reunify the family by helping the child and family address the risks to the child which prevent reunification." Decree ¶ 16a. This provision goes on to further define "reasonable efforts" in a manner similar to Paragraph 8. For the reasons set forth above, Paragraph 16a, like Paragraph 8, does not reach the issues in this case.

the time a shelter care hearing is held.[10] This initial assessment is a "preliminary assessment of the child and family sufficient to (i) permit DCFS to identify reasonable efforts, if any, that can be made to address allegations of abuse and neglect and keep a family intact; (ii) identify any needs of an emergency nature; (iii) commence to identify and preliminarily select appropriate family and relative resources. . . ." Decree ¶ 7.

Plaintiffs mistakenly assume that this paragraph requires that a DCFS follow-up caseworker, rather than an investigator, perform the initial social assessment, citing the district court finding in this case that "DCFS investigators have no role in arranging for the delivery of child welfare services." (Supp. Br. 3 & n.3). Paragraph 7 does not address the *delivery* of child welfare services; the provision carefully circumscribes the scope of the initial assessment to *identifying* reasonable efforts and emergency needs and to commencing to identify family resources. Moreover, the *B.H.* Decree itself, unlike the district court finding below, expressly provides that the term "caseworker" includes both investigators and follow-up workers. Decree ¶ 1c. Thus, plaintiffs are incorrect that Paragraph 7 necessarily requires the assignment of a follow-up caseworker.[11]

The Case Staffing and Management Provisions

Finally, plaintiffs cite a series of provisions in the *B.H.* Decree regarding case staffing and management that plainly do not address the question of the prompt and continuous assignment of follow-up caseworkers. In Paragraph 28, DCFS has agreed to

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[10]The shelter care hearing, also known as the temporary custody hearing, is the first Juvenile Court hearing held if a child is taken into DCFS custody. Ill. Rev. Stat. ch. 37, ¶ 802-9; *see also* Findings of Fact ¶¶ 1-3 (J.A. 33-34). If the case is one involving a child living at home, the first court hearing would not be a shelter care hearing. (J.A. 34). Thus, even if this provision had some bearing on the assignment of caseworkers, which it does not, it would *not* apply to Class A members living at home.

[11]In fact, DCFS provides testimony at the fairness hearing on the *B.H.* Decree indicating that the initial social assessment likely would be conducted by investigators, who would receive additional training and support to enable them to perform this function. *B.H. v. Suter*, No. 88 C 5599, Tr. of Nov. 8, 1991 Hrg. at 37-38 (Testimony of Joseph F. Loftus).

limit caseloads for follow-up workers by July 1, 1993 and July 1, 1994 to specified ceilings. This provision clearly has no effect on the preliminary injunction, as the district court's order itself explicitly states that specific caseload ceilings were not at issue in the *Artist M.* injunction proceedings and are not imposed by the injunction order. (App. 55a-56a).

Plaintiffs also refer to Paragraph 10 of the Decree, which states that the Interim Service Team ("IST") approach to case staffing will be eliminated by July 1, 1993. There is nothing in Paragraph 10 that requires DCFS to continue assigning cases within three days as required by the injunction here; likewise, the *Artist M.* injunction does not require DCFS to use the IST approach to assign cases.[12]

Moreover, plaintiffs' Supplemental Brief overlooks their prior arguments that the IST solution to initial caseworker assignments did not address the problem of reassigning cases when workers were absent or left the Department. (Resp. Br. 8; J.A. 40, 44-45). Thus, the injunction requires that cases be reassigned within three days after the previously assigned caseworker "relinquishes responsibility for any portion of a case." (App. 56a). Paragraph 28d of the *B.H.* Decree, however, permits DCFS to assign supervisors, not follow-up caseworkers, to cases because of a short-term caseworker absence or vacancy. Accordingly, the Decree, unlike the injunction, specifically contemplates gaps in the reassignment of cases that may *exceed* three days.[13]

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[12]Paragraph 10 was included in the *B.H.* Decree to address concerns raised by the *B.H.* plaintiffs that the IST approach resulted in too many different caseworkers handling the same case. In contrast, the district court disregarded DCFS's expressed fear that the injunction here would exacerbate the problem of assigning cases to multiple caseworkers in order to meet an across-the-board time limit on assignments. (R. 85 at 37).

[13]Plaintiffs also refer to Paragraph 26c of the Decree, which requires a case management system that "identifies a caseworker . . . with the training, competence and authority to carry out Department policies . . . and the terms of this Decree." This provision does not require that such a caseworker be continuously identified and assigned, or assigned within three days or any specified time period at all. Indeed, the object of this provision was to ensure that caseworkers are trained, competent, and have sufficient authority to accomplish assigned tasks, not that they be assigned quickly.

II. THE *B.H.* DECREE HAS NO BEARING ON THE CASE BEFORE THIS COURT

A. The *B.H.* Decree Is Irrelevant to This Court's Interpretation of Section 671(a)(15) of the AAA

Plaintiffs initially argue that the *B.H.* Decree supports plaintiffs' legal position on the merits of this case. Plaintiffs attempt to cast the Decree as some sort of admission by DCFS that Congress has sufficiently defined the "reasonable efforts" clause in Section 671(a)(15) so as to create a federal right enforceable under 42 U.S.C. § 1983.

The Decree itself, however, explicitly states that "by agreeing to this Decree neither party makes any express or implied admission of fact or law." Decree ¶ 2. Indeed, as this Court has recognized, a consent judgment unaccompanied by judicial findings on the merits is not binding on the parties on any legal issue which might arise in another cause of action. *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 327 (1955); *see also* 2 *Newberg on Class Actions* § 12.49 (2d ed. 1985).

Moreover, the fact that DCFS chose to agree to provisions in *B.H.* that may exceed the scope of federal law is irrelevant. As this Court recently reiterated, "to 'save themselves the time, expense, and inevitable risk of litigation,' petitioners could settle the dispute over the proper remedy for the constitutional violations that had been found by undertaking to do more than the Constitution itself requires, but also more than what a court would have ordered absent the settlement." *Rufo v. Inmates of Suffolk County Jail*, 60 U.S.L.W. 4100, 4105-06 (U.S. Jan. 15, 1992) (quoting *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971)).

Furthermore, as set forth above, the *B.H.* Decree, as distinct from the AAA, expressly defines the term "reasonable efforts" used in Paragraphs 8 and 16a. *Supra* at 3-4. The fact that the parties to the *B.H.* Decree crafted a definition of "reasonable efforts" that both sides could agree upon has no bearing whatsoever on whether the undefined term in Section 671(a)(15) creates a federal right. Indeed, if anything, the *B.H.* Decree serves to underscore the vagueness inherent in Section 671(a)(15): for example, unlike the Decree, Section 671(a)(15) makes no mention

of the best interests of the child, does not reference a specific list of services, and does not make clear that custody can be taken regardless of this requirement if a child is in imminent danger.[14]

B. The *B.H.* Decree Does Not Render This Case Moot

In the alternative to a ruling on the merits, plaintiffs half-heartedly intimate that the *B.H.* Decree may render all or part of this case moot. The disingenuous nature of plaintiffs' suggestion, however, is evidenced by their failure to ask this Court to vacate the existing injunction against defendants should this Court find the case truly moot.[15] Plaintiffs apparently seek to deny defendants the right to a review by this Court of an injunction plaintiffs intend to leave intact. As this Court held in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 573 (1984), such a maneuver is untenable:

> [Plaintiffs] cannot invoke the jurisdiction of a federal court to obtain a favorable [ruling] and then insulate that ruling from appellate review by claiming that they are no longer interested in the matter, particularly when the [ruling] continues to have adverse effects on the other parties to the action.

The inference to be drawn from plaintiffs' glaring omission is that they believe that the injunction is still necessary to insure the

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[14]Plaintiffs also contend they should prevail on the merits because the preliminary injunction "cannot be viewed as either unduly burdensome or unrealistic" in light of the far more extensive obligations in the *B.H.* Decree. (Supp. Br. 5). Plaintiffs' argument is beside the point. The sole issue before this Court is whether there is a legal basis for plaintiffs' claims, namely whether Section 671(a)(15) creates a federal right that may be enforced by plaintiffs. (*See* Pet. Br. i, 3 n.2, 6). The relative burden of the preliminary injunction is irrelevant.

[15]Plaintiffs' feeble attempt to raise a factual question regarding mootness is unavailing. (Supp. Br. 7-8). The entire basis for plaintiffs' mootness claim rests on the terms of the *B.H.* Decree, which this Court is capable of reviewing and evaluating. Thus, this case is not similar to *Johnson v. Board of Educ.*, 449 U.S. 915 (1980), *after remand*, 457 U.S. 52 (1982) (cited at Supp. Br. 8), where, in connection with implementing a consent decree in a separate action, the defendant school board announced it had voluntarily discontinued the use of racial quotas in high school admissions. The use of quotas was not the specific subject of the related consent decree, thus a factual question existed as to the extent of the school board's voluntary actions.

prompt and continuous assignment of caseworkers, notwithstanding their assertions that "*B.H.* ultimately provides all of the relief which plaintiffs here sought regarding initial caseworker assignment." (Supp. Br. 7). Indeed, the Decree nowhere requires that follow-up caseworkers be assigned in all cases within three days after the first court hearing (nor does it provide for such assignment within twenty-four hours as originally sought in plaintiffs' Complaint).[16] (J.A. 26). Moreover, most of the *B.H.* provisions cited by plaintiffs will not take effect for at least another year and a half, or longer. Clearly, the *B.H.* Decree does not provide the relief afforded plaintiffs under the injunction order, which has been effective since May 31, 1990.[17] (App. 56a).

Plaintiffs further try to confuse the issue with respect to the members of Class A who are children living at home. The *B.H.* class includes only children who are in DCFS custody and have been placed somewhere other than their home. Decree ¶ 1e. Yet plaintiffs initially assert that they believe plaintiffs living at home will be able to enforce the terms of the *B.H.* Decree.[18] (Supp. Br. 7). Later in their Brief, plaintiffs suggest without explanation that remand is necessary because "[t]he claims of some of the plaintiffs have been mooted by *B.H.* [while] [o]ther plaintiffs' claims may survive." (Supp. Br. 9). Neither proposition is valid. The *B.H.*

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[16]Even if, *arguendo*, the *B.H.* Decree had some effect on the preliminary injunction, both the district court and the court of appeals held that the AAA creates an enforceable right to "reasonable efforts." As this Court noted in *Stotts*, "[t]hese rulings remain undisturbed, and we see no indication that respondents concede in urging mootness that these rulings were in error and should be reversed. To the contrary, they continue to defend them. . . . For this reason alone, the case is not moot." *Stotts*, 467 U.S. at 569-70.

[17]Thus, this case is not remotely similar to *American Foreign Service Association v. Garfinkel*, 490 U.S. 153 (1989), in which the federal regulations at issue already had been changed and individualized notice already provided to affected federal employees. (Supp. Br. 9-10).

[18]In fact, this proposition is directly contrary to long-standing precedent of this Court. As stated in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975), "a well-settled line of authority from this Court establishes that a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it even though they were intended to be benefited by it."

Decree has the same effect on the claims of *all Artist M.* class members, namely *no* effect.[19]

In order to prevail on their mootness argument, plaintiffs bear a heavy burden of showing that it is " 'absolutely clear,' absent the injunction, 'that the allegedly wrongful behavior could not reasonably be expected to recur.' " *Vitek v. Jones*, 445 U.S. 480, 487 (1980) (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968); *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)). Plaintiffs have utterly failed to meet this burden, and their claim of mootness should be disregarded in its entirety.

CONCLUSION

WHEREFORE, petitioners respectfully ask that this Court reverse the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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[19]Accordingly, plaintiffs' attempt to analogize this case to *Kremens v. Bartley*, 431 U.S. 119 (1977), is unavailing, as the *B.H.* Decree does not fragment the *Artist M.* class with respect to the issue of the assignment of caseworkers within three days, or even the provision of "reasonable efforts" within that time. (Supp. Br. 9-10). The remaining authority in the Supplemental Brief is similarly inapposite. *See J. Aron & Co. v. Mississippi Shipping Co.*, 361 U.S. 115 (1959) (consent decree entered in case before the Court, *not* a wholly separate case) (cited at Supp. Br. 8); *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986) (remand ordered because courts below had misapplied the law and failed to make sufficient factual findings) (cited at Supp. Br. 10).